



THE MYTH AND REALITY OF JUDICIAL ACTIVISM WITH REFERENCE TO PAKISTAN AND WESTERN COUNTRIES

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Abstract

A judiciary is an independent body that is even unhanded, unbiased, and unprejudiced. It functions within the framework of the constitution, defined under the concept of the separation of powers. It interprets the constitution which is supreme and at times needed, supports the rule of law and the standards laid down in the constitution. Judicial Activism means the rulings of the court based on political and personal rational and prudence of the Judges presiding over the issue. It is a legal term referring to court rulings based, in part or in full, on the political or personal factors of the Judge, rather than current or existing legislation. Judges must be sometimes cautious and sometimes bold. Judges must respect both the traditions of the past and the convenience of the present. Judges must reconcile liberty and authority; the whole and its parts. Impartial, independent and positive justice is the foundation of the efficiency of the government. Governance is the prerogative of the legislature being a popularly elected body of the people. The executive is responsible for the proper enforcement of the laws made by the legislature. But when the legislature does not bother about the rights and liberties of the individuals and the executive becomes apathetic in the matters of implementation of the laws, the judiciary is the only way out to act as the engine of social welfare to secure justice for every citizen in the various spheres of life whether it is child labour or environment or human rights. Judicial



activism is nothing but an expanded role of the judiciary as it encompasses an area of the legislative vacuum. It is an effort to revitalize the system through the provision of simplest, fastest and inexpensive access to individual.

Keywords: Judicial activism internationally, Judicial review, Supreme court of Pakistan, Case law, Judicial function

Introduction

Judicial activism is a broader term used to define the process of judicial review i.e. a constitutional power vested with the superior courts to adjudicate on the constitutionality of a law, statute, administrative action, constitutional provision or an amendment. The power of judicial review is exercised worldwide by the superior courts as it is a strong legal tool in the hands of the judiciary to make ineffective all extra-constitutional acts and policies of the administrative, executive and legislative authorities. Likewise, the Supreme Court of Pakistan is also exercising this power though more frequently, now-a-days to check the arbitrariness of various state/government actions and policies. Although, this practice is not new in Pakistan, it dates back to famous Maulvi Tameezuddin Case 1953 till present day Panama Leaks Case, but this term gained significant attention since 2007 especially due to the active role of the then Chief Justice Iftikhar Chaudhary and lawyers' movement. Supreme Court judges are often criticized for intervening in government policies and nullify them on various accounts. Critics say that the Supreme Court is intermeddling in the affairs of the State by travelling beyond its jurisdictional domain thus damaging democratic values.

Judicial Activism

Judicial activism is a virtue only when it is accompanied by restraint. In Pakistan, as in the US, the Supreme Court has been notable not for restraint, but for excess. The US Supreme Court is in a pitiable state. There was a time when its rulings were regarded as persuasive authorities of high scholarship, for it was there that the debate on judicial activism versus judicial restraint began and continued for long.

As far back as 1921, Justice Benjamin N. Cardozo gave a lecture on the nature of the judicial process in which he delivered a sound warning. "Judges have, of course, the power, though not the right, to ignore the mandate of a statute, and render judgement in despite of it. They have the power, though not the right, to travel beyond the walls of the



interstices, the bounds set to judicial innovation by precedent and custom. Nonetheless, by that abuse of power, they violate the law.

Misconceptions about the function of a constitution and the proper role of the judiciary in interpreting it lie at the root of the problem. Justice John Marshall Harlan pointed out, "The constitution is not a panacea for every blot upon the public welfare; nor should this court, ordained as a judicial body, be thought of as a general haven for reform movements. This constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lays the greatest promise that this nation will realise for all its citizens. This court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority even to satisfy justified impatience with the slow workings of the political process."

The court is not a substitute for a democratic political process

The court is not a substitute for but a supplement to the democratic political process. Executive and legislative excesses can be cured by the courts. But who will cure judicial excess? "The only check on our own exercise of power is our self-restraint," chief justice Harlan F. Stone once remarked. The foremost advocate of judicial activism, Lord Denning said in 1980: "It endangers continued public confidence in the political impartiality of the judiciary, which is essential to the continuance of the rule of law, if judges, under the guise of interpretation provide their own preferred amendments to statutes which experience of their operation has shown to have had consequence that members of the court before whom the matter comes consider to be injurious to the public interests." There was no problem for the court to solve. Judges are as much subject to the law, criminal or civil, as any other citizen. The court's order is an excess of judicial activism. Such excesses occur when the executive is weak. Then the judges grab power. (Dawn, 2018)

Parameters of Judicial Activism

A certain number of variables can be put forward for the assessment of judicial activism as defined above in any given context.

1) The Conception of Judicial Function

How judges and other actors in a legal system conceive the nature and scope of the judicial function bears understandably on the way judges go about judicial business. Judicial function can be construed narrowly as consisting of deciding particular cases without



pursuing any grand design. This roughly corresponds to the 'judges-as-dispute model' described by Martin Shapiro. (Martin, 1984) An alternative model is the one in which settlers' judges are expected to perform broader tasks by 'giving meaning to the public values' of the community within which they operate.

2) The Degree of Determinacy in the System

It is not necessary here to enter into a theoretical debate on the extent to which law is indeterminate. What is important to bear in mind for the purposes of this study is that in any given legal system the question of determinacy operates on two distinct levels. The first level is the determination of what counts as law in the system; the second level involves the interpretation of law thus identified. Judicial activism obviously has something to do with both of these questions given that judicial discretion increases with the indeterminacy at either level.

3) The Existence of a Hierarchically Structured Judicial System

This item requires little explanation. In a system with a hierarchically organized judicial system, judicial decisions are subject to appeals that constitute an additional source of constraint on judicial discretion. In other words, decisions involving what is considered to be an inappropriate exercise for the judiciary can always be overturned at a higher level.

4) Prudential Doctrines about the Relationship between Judicial and Political Branches

Most legal systems possess some prudential doctrines (political question, act of state, acts due gouvernement, etc.) invoked by judges to avoid interfering with politically sensitive questions. Even though they are rarely formalized, these doctrines are part of the game of law and accordingly shape the expectations of legal actors. They are obviously relevant to the sense of appropriateness of judicial approaches.

5) The Mechanisms of Political Control

Judges do not operate in a vacuum. Because judicial decisions are addressed to particular audiences, judges are understandably sensitive to the reactions of those audiences. At the same time, judges' political interlocutors are unlikely to be passive observers of judicial decision-making given the political costs of many judicial decisions. Interaction between judges and their interlocutors is therefore an important parameter for analyzing judicial behaviour, especially if that interaction gives rise to what has been called mutual



‘expectation of expectations’. Using the analytical framework developed by Bourdieu for a theory of practice, one can say that the interaction ‘functions like a self-regulating device programmed to redefine courses of action in accordance with information received on the reception of information transmitted and, on the effects, produced by that information.’ (Agergaard, 2007)

As far as judicial activism is concerned, the crucial elements are the ‘exit’ and ‘voice’ mechanisms available within the system to those who are unsatisfied with judicial decisions. Judges may understandably be influenced by a prospect of being overturned. Accordingly, as recently asserted in the political science literature, ‘as long as courts care about influencing policy, they have an incentive to anticipate legislative and executive reactions when making their rulings.’ (Carrubba, 2008)

6) The Legitimizing Function of Legal Academics

As the late Sir Robert Jennings put it, ‘the most important requirement of the judicial function is to be seen to be applying existing, recognized rules, or principles of law’ even when ‘a court creates law in the sense of developing, adapting, modifying, filling gaps, interpreting, or even branching out in a new direction.’ (Jennings, 1998) It is argued that this ‘fiction-maintaining’ function is essentially accomplished by legal academics who, by stripping cases of their singularities, bringing them under the jurisdiction of general ‘neutral principles’, and submitting judicial decisions to an analysis which is always already committed to the ideal of rational reconstruction, enhance the legitimacy of those decisions. This scholarly disposition has clear implications for the way in which legal analyses are conducted: the legal analyst generally looks only to ‘noble’ reasons and public-regarding justifications and is thus committed to what has been called ‘legalism’, an attitude which consists in seeing or presenting ‘the case law as the inevitable working out of the correct implications of the text; and the court as the disembodied voice of right reason.’ (Shapiro, 1979) Since judicial activism as defined of what is an appropriate judicial course of action, the latitude judges enjoy in a legal system also depends on the degree of efficiency with which the theoretical discourse about law performs this legitimating function.

7) The Nature of the Proceedings

Many parameters may be relevant in this regard. An advisory proceeding does not technically have to face compliance problems and therefore may involve more interpretive freedom for judges. In the same vein, permanent tribunals may feel less constrained than



tribunals appointed by the parties. Judicial activism literature also considers access to tribunals and implementation of final decisions as relevant parameters in that the extent to which they are independent of the will of governments can impact the degree of freedom enjoyed by judges. (Keohane, 2000)

8) Discursive Constraints

As any discursive space, the space of judicial discourse is subject to constraints. In systems committed to the ideal of the rule of law as opposed to the system of 'kadi justice', judges cannot decide cases in whatever way they like, as legal enterprise imposes on them a certain number of 'disciplining rules.' (Fiss, 1981)

9) Social Legitimacy Considerations

Since they operate within a socially organized order, judges pay attention not only to the 'legal legitimacy' of their decisions, but also to social legitimacy considerations. (Fallon, 2004)

There are many reasons why they might want to do so, and considerations of 'appearance management' are not the least of these. Depending upon the context, social legitimacy considerations can pull judges toward activism or judicial restraint. Societal demands therefore seem relevant for framing the issue of judicial activism.

Judicial Activism and Pakistan: A Case Law Study

An effective judiciary is subject to its impartiality. Generally speaking, primary function of the state is dispensation of justice. The judicial autonomy got international recognition through various conventions such as the UDHR, 1948, the ICCPR, 1976, and 1985 the UN Convention on Prevention of Crimes and Treatment of Offenders. The supremacy of the Constitution is guaranteed through the courts. The Constitution also bestows impartiality of the judiciary. Independent judiciary helps keep every organ working in its constitutionally defined jurisdictional circle. In the US history, *Marbury v. Madison* (Madison, 1803) is an important milestone that created the foundation for Judicial Review. It established the authority for Judicial Review of Congressional and Presidential actions. Further, it declared supremacy of law that even the President is subject to the law. It also articulated that judiciary can award remedy against the executive when a particular duty is imposed on it, but not when a matter of political nature is left on its discretion. A lame and weak



judiciary shall be mere a façade as it will be subject to political exploitation and rule of law will be undermined in its absence.

The Constitution of Pakistan envisages trichotomy of powers, which enables every state organ to work in its respective sphere. In a federal system of government, judicial review is far more important because it keeps a federation and its units in their limits and does not let them overstep beyond the powers granted under Constitution. A constitutional mechanism is regulated to ensure the impartiality of courts and dignity of its officers. The preamble to the Constitution envisages autonomy of judiciary and disqualifies a Parliamentarian if he/she defames or ridicules judiciary. (Article 63) Furthermore, the Constitution of Pakistan, 1973 articulated certain provisions in order to ensure the impartiality of courts. These Articles include appointment of the Superior Courts' judges, term of their office, removal from office, Judicial immunity, freedom from Parliamentary criticism, exclusiveness of authority and original jurisdiction of the Supreme Court regarding any dispute between two or more Governments, advisory jurisdiction of the Supreme Court, issuance of decrees, orders, or directions as may be essential for doing complete justice, finality and binding authority of decisions and rules of procedure whereby Superior Courts are authorized to make rules so as to regulate practice and procedure of the Courts. (Article 191, 201)

Similarly, state functionaries derived their authority from the Constitution and are expected to use their power within the limits prescribed by the Constitution. Public authorities are required to act rationally, independently, and without arbitrariness within the prescribed authority. In case where a person is aggrieved of any administrative action or where protection of fundamental rights is concerned, such person can approach the Superior Courts in order to review the impugned order.

In casetitled, *Munir Hussain Bhatti v. Federation of Pakistan* (PLD 407), where the Parliamentary Committee refused recommendations of the Judicial Commission regarding the appointment and extension of the four judges of LHC and two judges of the SHC on the pretext that the former represents will of the Parliament. Hence, decision of the Parliamentary Committee cannot be reviewed. It was held that appointment, removal, and term of judges ensure judicial impartiality. The Court observed that it has constitutional right to review decision of the Parliamentary Committee which tis working as an executive body and to ensure tindependence of state organs with a reasonable control.

In case of *Musammat Badshah Begum v. Additional Commissioner Lahore Division* (SCMR 629), the Supreme Court observed that the Court has ample power of judicial



review in order to make sure just, fair, and reasonable application of law. Further, courts are not bound by the letters of law rather bound by the spirit of law. The rationale behind power of judicial review can be contemplated briefly in the following points:

- a) In order to secure supremacy of the Constitution, power of judicial review has been granted. Courts are guardians of the constitution and do not allow even themselves to override the provisions of the Constitution. Further, courts are considered to be the first-hand machinery for the implementation and enforcement of the Constitution. Moreover, if there is conflict of ordinary law and the constitution, the constitution stands upright and the law is declared void. In case of *Sayed Abul Ala Maudoodi v. Government of West Pakistan* (PLD 673), the Supreme Court held that the Constitution is supreme and it has to prevail over the ordinary law. This is possible only when the authority of judicial review is admitted.
- b) It is a tool to uphold rule of law by interpreting the Constitution and ordinary laws as well as it ensures protection of rights and liberties to all individuals against undue interference. It means that judicial review stands for equal protection of law and equality before law as provided by Article 4 and 25 of the Constitution of Pakistan, 1973 respectively.
- c) Judicial Review is meant to secure rights of people and has come to play a vital role to rescue people from the abuse of authority being exercised by public functionaries. The underlying objectives of Article 199 are summed up in the case of *Muhammad Basher v. Abdul Kareem* (PLD 271). The Court observed that it is duty of the Court to protect fundamental rights of the people, to act and aid the law, and to protect the law and Constitution against exploitation by the state functionaries. Further, it is duty of the Court to strike a fair balance so as to create a rational compromise of state functionaries with the rights of citizens.

Conclusion

The above remarks enable us to draw a provisional conclusion to which proponents of 'legalism' could hardly subscribe: formal considerations are never dispositive of the role of judges, and the real influence that judges end up having in any legal system depends on the environment in which they work, the reception of their decisions and on a number of other parameters examined above. This is particularly true in international law, where the delimitation of powers is notoriously unclear. The suggested approach also accounts for a seeming paradox, namely the relatively significant power of judges in a system in which



the structural logic of the normativity game does not at first sight seem to leave much room for a truly influential judicial power.

Given that the contours of judicial power do not depend on formal rules agreed upon once and for all, judicial power as defined in this study is a constantly shifting phenomenon. Without doubt, some international courts are more frequently described as activist than others. However, no international court could afford the luxury of logical consistency in this regard. Identifying the relevant variables and assessing their respective influence on judicial activism against the background of international legal practice has been the main purpose of this discussion.

The concept of judicial activism in Pakistan can be traced back to the Government of India Act, 1935 (Indian Act, 1935), which was incorporated in Article 170 and 22 of the 1956 Constitution, Article 98 of the 1962 Constitution, and Article 199 and 184 (3) of the 1973 Constitution. The concept of judicial activism emerged with the Islamization of laws by Zia-ul-Haq in the 1980s, which were categorized in the form of structural, procedural, and criminal law reforms. The Appellate Shariat Bench of the Supreme Court was delegated with limited suo motu jurisdiction, in order to check consistency of laws with the Islamic injunctions. Nonetheless, the Superior Courts expanded this power and replaced codified laws with un-codified Shariah principles.

Prior to the incorporation of Article 2A, the court consented that the executive has exclusive authority in the Islamization of laws. In 1985, by virtue of Article 2A, Objectives Resolution was made a substantive part of the Constitution, which made the Shariah superior over the statutory system and authorized the court to apply it directly.

In 1980, Federal Shariat Court was established and Shariat Benches of the High Courts were disbanded. However, with Zia's death the Islamization of laws was interrupted, which was resumed by Nawaz Sharif who remained the Prime Minister of Pakistan for three times without completing any of his tenure. The concept of judicial activism has been significantly associating with the suo motu jurisdiction of the Superior Courts. It is worth-mentioning that there is no such concept in the USA. The courts can only adjudicate upon the legal dispute brought about by the adverse parties.

The Supreme Court of Pakistan by virtue of Article 184 (3) exercises suo motu jurisdiction and takes cognizance where the matter in dispute is of public importance and associated with the protection or enforcement of fundamental rights. After the restoration of the judiciary in March 2009, the superior judiciary significantly acquired its autonomy not



only from Military and its associates, but from Parliament and consequently narrowed down functional space for the executive.

The civil government also expanded its authority for its supremacy creating the dilemma of institutional conflicts, which ultimately helps reinforce military and its affiliated interests. After military invention of 1999, *Iftikhar Chaudhry* validated Musharraf's every extraconstitutional action, until the former assumed the charge of the Chief Justice in June 2000. The regime's expectations turned around when the court challenged the regime's authority.

The privatization and economic liberalization policies created room for public interest litigations. The court strategically challenged the regime – started from implication of provincial officers in the CDA and the LDA cases, implicated the Federal Ministers in the oil and sugar prices cases, implicated the Prime Minister in the privatization of the PSO, the PTCL, and the PSM cases, implicated Army and agencies in the missing persons cases, and finally implicated Musharraf to contest presidential election while serving in the Army. As a consequence, Chaudhry remained suspended for four months until October 2007. The Court withheld the results of presidential elections, in order to review Musharraf's eligibility for the presidential elections. However, Musharraf proclaimed emergency before the Court's decision. There were so many contributing factors that involved in the Court's transformation from pro-regime to anti-regime: *Iftikhar Muhammad Chaudhry's* strategic leadership, regional jurisprudential advancement, the role of media and civil society, policies of economic liberalization, and regime's adherence to the court's directions without realization of its repercussions.

Discussing the constitution of Pakistan, Neudorf (2017) discusses the concept of judicial activism or freedom as stated below:

“Judicial independence is a theme that can be seen throughout Pakistan's history. For example, Pakistan's first Constituent Assembly passed a resolution in 1947 on the Aims and Objectives of the new country that expressly called for an independent judiciary” (Neudorf, 2017)

He maintains that the clause of protection of human rights of citizens creates potential for conflicts between Supreme Court and executive since it's the constitutional responsibility of the Supreme Court. He terms Pakistani constitution as ambiguous when it comes to ensuring fundamental rights of the citizens thus it leads to a tussle among the judiciary, executive and legislature i.e. parliament. One can observe its example when recently



certain amendments were challenged in Supreme Court of Pakistan leading to tension between the judiciary and executive.

He further explains this tussle in these words:

“Constitution insulates judicial decision-making from the most obvious forms of direct tinterference or improper influence by the executive and legislative branches; the role it assigns to the courts creates the potential for tension between judges and the elected branches. First, the Constitution calls upon the Supreme Court to interpret fundamental rights and scrutinize actions taken by the executive and legislature to ensure compliance with those rights. Second, the Constitution establishes the principal institutions of government and imposes limits on their powers, which are enforced by the judicial branch.”

He argues that Executive and legislative action is subordinate to judicial decision-making in both types of cases and may be held to be constitutionally invalid. The judiciary faces a delicate task in deciding these important and closely watched cases because of the important interests at stake. While not every decision stand to implicate the independence of the judiciary, the suggestion of a preference toward the government in a case or large proportion of cases decided in favor of the government might call judicial impartiality into question. On the other hand, the government itself is a party to the litigation, presenting arguments on the interpretation and application of tconstitutional terms that may be rejected by tthe judicial tpanel, which could raise tension between the branches. Court judgments adverse in interest to the government could be perceived by the government as an impediment to the realization of public policy. These decisions could be especially embarrassing as members of the executive and legislature are sworn to uphold the Constitution in the same manner as the judiciary. In effect, an adverse judicial decision in a constitutional case could be seen as a judicial admonishment that government officials violated the oaths of their offices to discharge their duties “faithfully in accordance with the Constitution” and to “preserve, protect and defend the Constitution”.

Pakistan’s courts have decided against the government in a number of significant constitutional cases during civilian rule. While discussing the role of Supreme Court in facing military intervention, he argues that Supreme Court adopted a submissively deferential approach to the regime in order to prevent the breakdown of the state. Describing the submissive policy of Supreme Court during the 1999 Emergency of Gen. Musharraf, the defends the policy in these words:



“Supreme Court took a bold new approach from its previous pattern: it continued to enforce constitutional rights under military rule, something it had only previously done under civilian governments. During Pervez Musharraf’s time in office, the Supreme Court imposed new limits on the regime, including mandating timelines for elections. The Supreme Court also continued to review the legality of government decisions despite privative clauses attempting to oust judicial oversight. The constitutional doctrine of judicial independence continued to develop through the case law during military rule, shifting from an institutional focus to the role of the Chief Justice as the head of the judiciary”

He terms Judiciary incapable of maintaining its expanded role of judicial activism in the longer run. Firstly, popular expectations of what the Supreme Court can achieve might not be sustainable if the Supreme Court continues to decide highly contested cases with real winners and losers and creates legal uncertainty through its unpredictable intervention especially in the light of recent high-profile cases. Secondly, retirement of Chief Justice Iftikhar Muhammad Chaudhry resulted in a less confrontational or even divided bench on the Supreme Court, which could weaken its powers and institutional standing. It is notable that the public now appears divided on the record of the former Chief Justice. Thirdly, the support of international organizations, a key component of the success of the Lawyers’ Movement, has become muted in recent years. Criticism of Suo Motu notices by the International Commission of Jurists and the call for clear guidelines on its use by the United Nations Special Rapporteur on the Independence of Judges and Lawyers indicate a more qualified international support for Pakistan’s conception of judicial independence than in the past. Fourth, a future economic or social crisis may require an urgent response from the government or the military, which could highlight the institutional limitations of the judicial branch.

Neodorf concludes the discussion with these final words:

“This judicial victory cannot mean that a nearly limitless conception of judicial independence and power should ultimately prevail in a democratic state. Moving toward a more balanced system of government, which includes space for genuine dialogue and contributions by each branch, appears necessary for a democratic future.”



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